Supreme Court, U.S.
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No. 95-974

In The

Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH
and ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ;
JAIME GUTIERREZ; and ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' REPLY BRIEF IN OPPOSITION TO THE JUDGMENT

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The State filed its Brief in Opposition to the Judgment several weeks before the other Respondents so they would have the opportunity to respond to the State's argument that there is no live case or controversy with respect to Respondent Yniguez. This Reply Brief addresses only Respondent Yniguez's response to the State's argument, since she is the only Respondent who addressed this issue. *Cf. Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990) (the Federal Energy Regulatory Commission did not petition the Court for certiorari but filed as a respondent in support of the petitioners and filed a reply brief).

I. There Is No Case or Controversy with Respect to Respondent Yniguez.

Respondent Yniguez fails to address the Court's question and the State's position that no case or controversy ever existed between Governor Mofford and Yniguez because the Governor never threatened to enforce Article XXVIII of the Arizona Constitution against her. Yniguez's assertion that the State did not address whether a case or controversy exists with respect to her, Brief for Respondent Maria-Kelly Yniguez (Yniguez's Brief) at 20, is simply wrong. *See* State's Brief in Opposition to the Judgment at 15-16. Yniguez's brief ignores this case or controversy argument and addresses only mootness. Yniguez thus fails to demonstrate to this Court how her lawsuit has ever satisfied Article III of the Constitution. Yniguez's failure to demonstrate actual injury is fatal to her ability to maintain her case and should result in dismissal of the appeal and vacatur of

the lower court decisions. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *see also Lewis v. Casey*, 116 S. Ct. 2174, 2179 (1996) ("It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The district court specifically stated that "there is no evidence of record to establish that Yniguez's asserted injury is anything except purely conjectural and hypothetical." Pet. App. 103a. Yniguez does not dispute this point. Therefore, there never was a case or controversy before the federal courts.

Although Yniguez addresses the mootness issue, she argues that mootness is not encompassed within the question raised by the Court concerning whether a case or controversy exists with respect to Yniguez. Yniguez's Brief at 20. Again, Yniguez is simply wrong. "The inability of the federal judiciary 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' " *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (per curiam) (quoting *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1974)). Thus, if Yniguez's claims are moot, a case or controversy does not exist. *See De Funis*, 416 U.S. at 317 (" 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them' ") (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

Yniguez effectively concedes[1] mootness by acknowledging that she must prevail on her nominal damage theory to satisfy Article III. Yniguez's summary response that her concocted, post-hoc nominal damage claim preserves the Ninth Circuit's jurisdiction over the case, after she voluntarily quit her job, fails to demonstrate the viability of her nominal damage claim. First, Yniguez claims in circular fashion that she suffered a compensable injury because "the injury [she] suffered was of a type this Court has held entitles her to an award of nominal damages." Yniguez's Brief at 21. This is supported solely by a reference to a portion of the Court's decision in *Carey v. Piphus*, 435 U.S. 247, 266 (1978), in which the Court merely describes certain holdings of "common-law courts" that are not directly relevant here. In *Carey*, the plaintiff had been suspended from school without the benefit of any type of hearing in unquestioned violation of the Due Process Clause. This case is fundamentally different from *Carey* because there was no enforcement of Article XXVIII against Yniguez and thus, no deprivation of a right. Yniguez merely responded to the new state law by going to court and asserting her rights in a vacuum.

Yniguez does not distinguish between a threatened violation of a First Amendment right, which may be sufficient to allow the individual to challenge the statute facially, and the independent requirement that there be an actual deprivation of a protected right in order to justify even nominal damages. *See Carey*, 435 U.S. at 267. The district court recognized this distinction and "found no

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[1] Yniguez does not defend her ability to seek declaratory relief. *See* Yniguez's Brief at 21-22.

evidence of record to establish that Yniguez's asserted injury is anything except purely conjectural and hypothetical. . . . " Pet. App. 103a. Whatever the merit of permitting Yniguez to pursue a claim for declaratory relief, which she now concedes is moot, there never was any basis for allowing her to seek damages of any sort based on her showing below. This is almost certainly why she never sought damages until after the mootness issue became a serious concern to her.

Second, the suggestion that the Governor was amenable to suit under *Ex parte Young*, 209 U.S. 123 (1908), and therefore is liable in damages is utterly inconsistent with the fiction that is the essence of *Ex parte Young*. That doctrine provides a mechanism by which individuals can, without running afoul of the Eleventh Amendment, enjoin States from violating the Constitution, and the holding is expressly predicated on the assumption that the State's fisc will not be jeopardized by such injunctions. *See, e.g.*, Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 2.12, at 145 (2d ed. 1992). Obviously, a holding that a state official, by being subject to injunctive relief under *Ex parte Young*, is thereby exposed or exposes the State to liability for damages runs completely afoul of this understanding. It is clear that the claim in this case is solely a challenge to Article XXVIII and as such is not a proper basis for imposing personal liability against an individual official. *See Edelman v. Jordan*, 415 U.S. 651 (1974).[2]

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[2] Respondent Yniguez does not address the separate problem that 42 U.S.C. § 1983 does not permit an award of damages to be entered against Mofford. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Thus, even if *Ex parte Young* meant that the Eleventh Amendment is no bar, there is still the problem of how to obtain federal jurisdiction when the underlying claim is conclusively barred by a prior decision of this Court. Yniguez's silence on this issue supports the conclusion that this lawsuit is moot.

Third, there is no merit to Yniguez's claim that *Alejandrino v. Quezon*, 271 U.S. 528 (1926), can be distinguished. The flaw in that case is precisely the flaw in this case. The issue of seeking damages arose only as an afterthought and thus was "incidental" to the underlying claim, which had become moot. The Court's approach in *Alejandrino*, if followed here, would recognize the essential nature of Yniguez's claim and decline to entertain the damage claim that has never been developed and, by itself, raises a number of thorny legal issues. Accordingly, *Alejandrino* is clear authority in support of resolving this case solely on the ground that the declaratory judgment claim is unquestionably moot.

Finally, Yniguez's brief raises another fundamental flaw with her nominal damage claim. Yniguez asserts that Arizonans for Official English (AOE) did not have standing to appeal the district court's decision but that the Ninth Circuit had jurisdiction over the appeal nonetheless because the State was permitted to intervene pursuant to 28 U.S.C. § 2403(b).[3] The court of appeals did not

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[3] Yniguez also argues that pursuant to 28 U.S.C. § 2403(b), the State is restricted to arguing constitutionality. Yniguez's Brief at 20 n.6. The State is not precluded from advising the Court on the jurisdictional issues raised by the Court's questions to the parties. These fundamental questions concerning the federal courts' power to consider this case are properly raised by the Court, *sua sponte*, *see United States v. Hays*,

have jurisdiction, however, because Yniguez's declaratory judgment claim was undisputedly moot when the court of appeals considered and then affirmed the district court's denial of the State's motion to intervene, thus barring the State from appealing the district court's judgment as a party. J.A. 179-83. Thus, even if the court of appeals had permitted the State to intervene as a party, the court would not have had jurisdiction over the appeal because Yniguez's claim was moot. Yniguez could not salvage her claim from being moot by belatedly claiming that the district court erroneously failed to award her nominal damages because she did not cross-appeal such a failure until more than two years after the State filed its original notice of appeal. Unlike AOE, which was permitted to intervene as a party, the State did not file a second notice of appeal. Thus, Yniquez's cross-appeal of the district court's failure to award nominal damages was invalid because there was no valid[4] or live appeal from which to cross-appeal.

In sum, Yniguez has failed to demonstrate that an actual controversy ever existed or that a controversy continued to exist after she left state employment and that the lower courts properly exercised jurisdiction over her complaint. Consequently, her case should be dismissed and the lower court decisions vacated. *See DeFunis*, 416 U.S. at 319-20 (quoting *Roe v. Wade*, 410 U.S. 113, 125

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115 S. Ct. 2431 (1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990)), and the State, as a party, is entitled to address the questions.

[4] AOE's appeal was invalid because AOE lacked standing to appeal the district court's decision.

(1973)) (" 'The usual rule in federal cases [is] that an actual controversy must exist at all stages of appellate or certiorari review and not simply at the date the action is initiated.' ").

II. This Court Should Vacate the Lower Court Decisions.

Yniguez argues that vacatur is unwarranted because the Governor decided not to appeal the district court decision. Yniguez's Brief at 23-25. The determination whether vacatur is warranted in a particular case, however, is based on a thorough consideration of the totality of the circumstances. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391-92 (1994). Here, the Governor's personal choice not to appeal cannot fairly be imputed to the State as a whole. The Attorney General sought to intervene in order to appeal the decision and should have been permitted to intervene. Yniguez does not dispute this. *See* Yniguez's Brief at 32 n.10 and accompanying text. The State acted reasonably under the circumstances and certainly did nothing to justify forfeiting a claim to vacatur.

Moreover, Yniguez blithely ignores her own role in creating the mootness problem. She voluntarily mooted this dispute by leaving her employment and failed to notify the court of appeals of this fact. Thus, the State was required to file a Suggestion of Mootness. A rule that permits a plaintiff to obtain a favorable judgment and then avoid appellate review by voluntarily mooting the dispute is hardly equitable. The lack of fairness in such a procedure is the basis of the *Munsingwear* doctrine, which

Yniguez completely ignores. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). On this basis, the Court is justified in vacating the court of appeals decision and ordering the district court to dismiss the complaint.

Yniguez also argues that the court of appeals had jurisdiction over the appeal and that therefore its decision should not be vacated. Yniguez bases her argument concerning the Ninth Circuit's jurisdiction on the State's appeal pursuant to 28 U.S.C. § 2403(b). Yniguez's Brief at 20 n.6 and accompanying text. This argument is flawed for two reasons. First, the court of appeals specifically held that the State was not permitted to intervene as a party and that the State's right to argue constitutionality was dependent on AOE's appeal. J.A. 182-83. Therefore, the State did not file a notice of appeal after the Ninth Circuit's intervention decision. Second, even if the State had been a party, the State's presence as a party could not cure Yniguez's mootness problem, which divested the Ninth Circuit of jurisdiction over her declaratory judgment claim. And, unless AOE was a permissible appellant in the court of appeals,[5] Yniguez could not cure her mootness by cross-appealing the district court's failure to award nominal damages because she failed to file a cross-appeal after the State filed its only notice of appeal.

This Court should vacate the Ninth Circuit decision and the complaint should be dismissed. At a minimum, this Court should vacate the Ninth Circuit decision because that court lacked jurisdiction over the appeal. *Cf.*

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[5] Yniguez acknowledges that AOE did not have standing to appeal the district court's decision. Yniguez's Brief at 10-18.

Karcher v. May, 484 U.S. 72, 83 (1987) (refusing to vacate because the lower courts had Article III jurisdiction). It is inequitable to allow the court of appeals' decision, which binds AOE as a party, to stand and then to prohibit AOE from appealing.[6]

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[6] Respondent Yniguez distorts the record to make the State's circumstance appear less equitable than it is. First, she treats the district court's judgment declaring Yniguez's rights as synonymous with a judgment for nominal damages. They are not the same. The district court never entertained any nominal damages claim and only entered the nominal damage judgment pursuant to the mandate of the court of appeals following the en banc decision. There was insufficient basis for the State to obtain a stay of the mandate.

Moreover, the State did not forego any rights before this Court. Petitioners challenged the judgment below and named the State as a respondent before this Court. And, in responding to this Court's order directing the parties to address the Court's jurisdictional questions, the State has acted appropriately.

CONCLUSION

For the reasons stated above and those stated in the State's Brief in Opposition to the Judgment, the judgment of the court of appeals should be vacated and the case remanded for entry of dismissal of the complaint.

Respectfully submitted,

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